

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ANSON BRADLEY, SR.,

Defendant-Appellant.

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UNPUBLISHED

August 13, 1999

No. 204652

Kent Circuit Court

LC No. 96-009826 FH

Before: Hoekstra, P.J., and Saad and R.B. Burns\*, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions for first-degree criminal sexual assault of his minor daughter, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and first-degree criminal sexual assault of his minor son, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). The trial court sentenced defendant to twelve- to twenty-years' imprisonment. We reverse and remand for a new trial.

I

Defendant says that the trial court abused its discretion by allowing defendant's adult daughter to testify about defendant's sexual abuse of her when she was a child. We disagree.

We review a trial court's decision to admit evidence for abuse of discretion. A trial court abuses its discretion when there is no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996); *People v Hackney*, 183 Mich App 516, 520; 455 NW2d 358 (1990).

Defendant's son testified that defendant sexually abused him and his younger sister. However, defendant's son admitted that he lied about the events on previous occasions. In addition, defendant presented evidence that the son suffered from a psychological condition known as "opposition defiant disorder" and that telling lies was one consequence of the disorder. The trial court allowed defendant's adult daughter, from a previous marriage, to testify that defendant sexually abused her because her

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

testimony was relevant as to whether the son fabricated the story of sexual abuse. The trial court gave the jury the following limiting instruction before the adult daughter testified:

This evidence is introduced for a limited purpose.

It's being admitted in this case because the Court thinks it may have some bearing on whether or not this story by [defendant's minor son] is a recent fabrication or whether or not the story by [defendant's minor son] arose out of or came about because of divorce proceedings between [defendant], and [defendant's wife].

And so this testimony is limited strictly to the question of credibility of the witness [defendant's minor son]. It's not admitted for anything other than that, and it's not to be used by you for anything other than that. You must not decide that this testimony shows or may show that the defendant is a bad person, or that the defendant is likely to commit crimes, or certain crimes.

You must not convict the defendant here because you think he is guilty of other bad conduct.

MRE 404(b)(2) prohibits the admission of evidence of a defendant's prior bad acts "to prove the character of a person in order to show action in conformity therewith," but allows the admission of such evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), our Supreme Court developed the following four-prong standard to protect defendants against impermissible inferences of the defendant's character from evidence of prior bad acts under MRE 404(b):

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

We conclude that the challenged testimony satisfied the four-part *VanderVliet* test. As to the first part, the prosecutor offered the testimony for proper purposes under MRE 404(b): modus operandi; unlikely coincidence; and to refute the defense that defendant's minor son fabricated the sexual abuse allegation as part of defendant's pending divorce. All of these are legitimate non-character reasons for presenting the testimony because defendant placed all the elements of the criminal sexual assault charges at issue when he entered a general denial of the charges. *People v Starr*, 457 Mich 490, 500-501; 577 NW2d 673 (1998).

The adult daughter testified that she told defendant's son that defendant abused her as a child. This testimony supports the son's testimony that these conversations prompted his statement alleging that defendant had abused him sexually. We conclude that the trial court did not abuse its discretion in

admitting the older daughter's testimony to rebut defendant's fabrication defense because her testimony explained why defendant's son waited more than a year after the alleged abuse occurred before he reported it.

The testimony satisfied the second part of the *Vandervliet* test because it was relevant under MRE 402 and 104(b). Testimony is relevant if it has any tendency to prove a fact in issue. *Starr, supra* at 497-498. Here, the testimony was relevant on the issue of the son's credibility because her testimony supported the prosecution's contention that defendant's son did not fabricate the sexual abuse claim against defendant and helped to explain the son's delay in reporting the abuse. The trial court's instruction, which limited the jury's use of the testimony to the sole issue of the son's credibility, adequately protected defendant from improper use of the testimony.

We disagree with defendant's argument that the trial court failed to weigh the testimony's probative value against any unfair prejudice to defendant, as required by *Vandervliet*. Although the trial court should explain on the record how it performed this analysis when counsel requests such an explanation, the trial court's failure to explain its rationale does not constitute error absent such a request. *People v Nabers*, 103 Mich App 354, 366-367; 303 NW2d 205(1981), rev'd on other grounds 411 Mich 1046 (1981). See also *People v Jeffrey Johnson*, 113 Mich App 650, 659-660; 318 NW2d 525 (1982). Because defendant accepted the trial court's ruling that the testimony was admissible, and did not request the court to explain its rationale, the trial court's failure to explain its analysis on the record did not constitute error.

Finally, the fourth part of the *Vandervliet* test was met because the trial court gave a limiting instruction. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the daughter's testimony.

## II

Next, defendant claims that the trial court erred in precluding defendant from presenting the videotaped testimony of defendant's minor daughter, which was given during a deposition in a juvenile court proceeding. During this testimony, the daughter denied that defendant sexually abused her. We agree with defendant that this constituted reversible error.

At trial, the prosecution called defendant's younger daughter to testify. However, after interviewing her, the court determined that the daughter was not competent to testify at trial. Also, the trial court did not allow defendant to introduce the daughter's videotaped prior testimony from the juvenile court hearing to impeach the testimony of either defendant's son or Michelle Bowersox, a counselor who testified that the younger daughter told her that she touched defendant's penis. Though the younger daughter's prior testimony was given before the juvenile court, and she was cross-examined by defendant's attorney, the trial court stated that it did not believe that the daughter "was or is" competent to testify.

We agree with defendant that the trial court should have admitted the daughter's previous testimony. The trial court determined that she was incompetent to testify under MRE 601. This Court

has held that when a child witness is prohibited from testifying under MRE 601 she should be considered unavailable for purposes of MRE 804(a)(4), which defines an unavailable witness as one who “is unable . . . to testify at the hearing because of . . . then existing physical or mental illness or infirmity.” See *People v Edgar*, 113 Mich App 528, 535-536; 317 NW2d 675 (1982), where we held that a child’s “inability or reluctance to answer the questions” made that child unavailable to testify at trial and allowed the prosecutor to present the child’s prior preliminary examination testimony under MRE 804(b)(1). See also *People v Karelse*, 143 Mich App 712, 714-715; 373 NW2d 200 (1985), rev’d on other grounds in *People v Karelse*, 428 Mich 872 (1987). Though the trial court found that defendant’s daughter was not competent to testify at the trial, the juvenile court found her competent to testify in the earlier proceeding. Once the juvenile court was satisfied that defendant’s daughter was competent to testify, the trial court’s later showing of her inability to testify truthfully or to communicate reflected on her credibility, not her competency. See *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991).

We disagree with the prosecution’s contention that the exclusion of the daughter’s videotaped testimony constituted harmless error. MCR 2.613(A) provides that an error in excluding evidence is not grounds for granting a new trial or disturbing a judgment “unless refusal to take this action appears to the court inconsistent with substantial justice.” Likewise, MCL 769.26; MSA 28.1096 provides that no criminal verdict will be set aside on the ground of rejection of evidence, “unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.”

Under the facts of this case, we conclude that the trial court’s exclusion of the daughter’s testimony was not harmless error because it deprived defendant of the ability to advocate his position and present significant exculpatory evidence from one of the victims.<sup>1</sup> The trial court’s error in excluding this important exculpatory evidence is not harmless. See *People v Minor*, 213 Mich App 682, 685-686; 541 NW2d 576 (1995). The error also prejudiced defendant because other witnesses were permitted to testify that the minor daughter made out-of-court statements accusing her father of sexual abuse. Specifically, the counselor testified that during an interview, the minor daughter described sexual contact between her and defendant. Therefore, because prejudicial out-of-court statements were admitted, but potentially exculpatory out-of-court statements were erroneously excluded, we cannot find that the error was harmless. Accordingly, we hold that the trial court abused its discretion when it refused to admit the minor daughter’s videotaped testimony.

Therefore, we reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Henry William Saad  
/s/ Robert B. Burns

<sup>1</sup> We note that the daughter’s testimony is not part of this record. However, all parties appear to agree that she denied having been sexually abused by defendant.